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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1972~~ 115

NATHANIEL BUCHANAN, et al.,
Plaintiffs-Appellants,

v.

JAMES A. RHODES, GOVERNOR, et al.,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Ohio, Eastern Division

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE MOTION TO AFFIRM THE JUDGMENT OF DISTRICT COURT

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

BRIEF IN SUPPORT OF MOTION TO AFFIRM JUDGMENT OF DISTRICT COURT

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Defendants-Appellees move this court, pursuant to Rule 16 (1), to dismiss this appeal as not within the jurisdiction of this court or in the alternative to affirm the judgment of the District Court because it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

WILLIAM B. SAXBE,
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First Assistant,
Attorneys for Defendants-Appellees.

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In the Supreme Court of the United States

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BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

This court has held that it has no jurisdiction on appeal from an order of a one-judge United States District Court overruling a motion to assemble a three-judge court pursuant to Title 28, Sections 2281 and 2284 U. S. Code. *Stratton v. St. Louis Southwestern R. Co.*, (1930), 282 U.S. 10, 15. It has been recently held by the United States Court of Appeals for the Second Circuit that an appeal lies to the Court of Appeals from the order of a single judge district court denying the motion for the assemblage of a three-judge court. *Bell v. Waterfront Commission of New York Harbor*, (2 Cir. 1960), 279 F. 2d 853 (opinion per Friendly, J.). The appeal, of course, is limited to the question of whether there is a substantial constitutional question. Cf. *Idlewild Bon Voyage Liquor Corporation v. Epstein*, (1962), 370 U.S. 713; *Bailey v. Patterson*, (1962), 369 U.S. 31.

Since there is now recognized a right to appeal to the Circuit Court of Appeals on this threshold question in Title 28, Section 2281, U.S. Code cases, there is no need for this Court to trouble itself with this initial question either by direct appeal or by issuing a writ of mandamus. Indeed, if *Stratton* is followed, this Court lacks jurisdiction on direct appeal and mandamus will not lie because there is a remedy by appeal. *Stratton v. St. Louis Southwestern R. Co., supra,* at 16.

Moreover, there are sound reasons why this Court should not take jurisdiction to review a district court order denying a motion to seat a three-judge court.

First, no doubt it would bring many frivolous claims to this Court (all of them thought frivolous by a district judge). Second, the Circuit Court of Appeals is closer to the situation giving rise to the cause and could probably give more complete and understanding treatment to the question in the inchoate posture it is bound to be in at this stage. Third, appellants should have but one avenue of appellate review, not two, both in fairness to appellees and in regard to the heavy burden the Federal Courts now have (such judicial burden seemingly of especial concern to appellants).

Therefore, appellees urge this Court to dismiss this appeal for want of jurisdiction.

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Opinion Below

The opinion of the United States District Court is reported at 249 F. Supp. 860 (N. D. Ohio E. D. 1966).

Question Presented

Did the United States District Court err in denying a motion to assemble a three-judge court because the claim for relief was patently without merit, where the relief sought was (among others) a declaration that Ohio's judicial structure is unconstitutional, and an injunction against the further operation of that judicial system, an order directing the Ohio Legislature to reapportion the Ohio Common Pleas Judges among the counties and an order directing the County Commissioners for Cuyahoga County to build a better court house which request for

relief was predicated on an alleged four-year docket delay in Cuyahoga County compared with lesser delays in other counties?

Argument

THE DISTRICT COURT WAS CORRECT IN NOT CONVENING A THREE-JUDGE COURT BECAUSE THE CONSTITUTIONAL ISSUE WAS WHOLLY UNSUBSTANTIAL IN THAT IT RAISED A NON-JUSTICIABLE "POLITICAL" QUESTION, AND MOREOVER, A QUESTION INVOLVING NO RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION AS HERETOFORE INTERPRETED BY ANY COURT IN THE UNITED STATES.

A. The request for relief is non-justiciable.

The standard of judiciability was stated by this Court in *Baker v. Carr,* (1962), 369 U.S. 186, 217, and quoted by the Court below:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment by various departments on one question."

It is appellees' contention that, marked by this standard, the issue presented and relief requested below, were so clearly not justiciable as to require no further debate or inquiry.

In the legislative reapportionment cases the standard was easily ascertainable: "one man-one vote." *Reynolds v. Sims*, (1964), 377 U.S. 533. That simple standard is followed by Ohio in the election of all its judges. Each elector of Cuyahoga county has one vote in the election of any of the Common Pleas Judges of Cuyahoga county. Since the Common Pleas Judges of Ohio do not assemble to vote *en masse* on judicial decisions nor do they legislate for all Ohio, there is no question of dilution of voting strength (in legislative reapportionment sense) in fixing the number of judges for the various counties in Ohio.[1]

Appellants assert that the standard here is just as simple, the implication being that the rate of litigation is a direct and sole function of population *and* that a judicial system works like a machine, so many judges handling a predictable and precise number of cases. The first implication ignores the realities of modern life and would, in fact, penalize the urban dweller. The differences in crime rates, divorce rates and commercial litigation (to name but a few) between urban and rural areas would go ignored.[2] More-

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[1] Appellant makes an effort to analogize apportionment of judges with legislators. But if the analogy were true in this case, what of county commissioners? Cuyahoga County has three for 1.6 millions and Vinton County three for 10,000? Or what about sheriffs, mayors, etc.?

[2] The present judicial system in Ohio recognizes these differences; for example, Cuyahoga county has six appellate judges, while Hamilton (Cincinnati), Butler, Clinton, Clermont and Warren counties have three appellate judges among them. Sections 2501.01 and 2501.012, Ohio Revised Code.

over, the differences in jurisdiction assigned various common pleas courts would go ignored.[3]

The second implication ignores the vagaries of having human judges and the differences various procedures and administrative practices can make. The Chief Justice of the United States made this point in a speech to the American Bar Association in 1958:[4]

"You all know the experience of New Jersey where, during the first year of operation under the new constitution, the courts disposed of almost twice as many cases as had been disposed of in the previous year. What you may not know is that—again—*this was done without adding any new judges,* but solely as the result of an improved procedure, improved judicial administration and last but not least, the inspired leadership of Chief Justice Arthur Vanderbilt." (Emphasis added)

Besides there being no judicably discoverable and manageable standard to resolve this issue, it is one that has been constitutionally committed to the Legislature for resolution. Constitution of Ohio Art. IV, Sections 1, 3, 4, 15. This same commitment of these issues to the legislative branch of government is found in the United States Constitution with reference to federal courts.

Furthermore, an interference here by the federal judiciary would ignore the many efforts made by past Ohio Legislatures to responsibly use their power in shaping the Ohio judicial system (131 Ohio Laws, 165; 130 Ohio Laws,

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[3] For example, the Franklin County Common Pleas Court has appellate jurisdiction over many administrative agencies and boards located in Columbus. E.g. Section 4301.31, Ohio Revised Code.

[4] Warren, *The Problem of Delay: A Task for Bench and Bar Alike,* 44 A. B. A. J., 1043 at 1045.

634; 128 Ohio Laws, 147; 127 Ohio Laws, 475; 126 Ohio Laws, 778).

In addition to increasing the number of judges, the Legislature has broadened the jurisdiction of the Cleveland Municipal Court (county-wide jurisdiction) thus reducing the load on the common pleas court.[5] The amount common pleas judges are paid [6] varies from county to county reflecting the fact that judges in the larger counties are expected to carry a fuller load than those in smaller counties.

These statutes all reflect the legislative concern with and various efforts made to improve the Ohio judicial system. This is a legislative problem and the Legislature has been meeting that problem. Now pursuant, to *Nolan v Rhodes*, 378 U.S. 556 (1964), the next Ohio Legislature will be constitutionally apportioned. Perhaps it will be even more responsive to the needs of the urban areas. Certainly that was this Court's hope. The fact that legislatures are so important to (actually essential for) solving complex political problems like the one appellants would have the federal courts solve, no doubt pursuaded this Court to break the self-perpetuating cycle of malapportionment in state legislatures, despite the many difficulties that such an excursion into the political realm would meet with. See *Reynolds v. Sims, supra* at 566.

In the legislative cases, the remedy was necessary and the standard easily ascertained from the Constitution itself. In this case, the remedy is unnecessary and the standard impossible to find by any judicial method of discovery.

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[5] Section 1901.17, Revised Code of Ohio (1965). The limit in Cuyahoga county is $10,000, in Franklin (Columbus) and Hamilton counties $7,500, in several others $5,000 and the rest $3,000.

[6] Section 141.05, Ohio Revised Code (1959).

B. Appellants have not stated a cause of action involving any rights protected by the equal protection or due process clauses of the Fourteenth Amendment of the United States Constitution.

The equal protection clause certainly does not demand that all laws have an equal effect on all people. It only protects against irrational classification and invidious discrimination. As the court below pointed out, the Ohio constitutional requirement of at least one judge per county is not irrational. Moreover, it in no way limits the number of judges other counties may have.

Would the fact that the "law's delay" might be more pronounced in Cuyahoga county than in Vinton county, reflect a policy of "invidious discrimination" by the state Legislature against all the people of Cuyahoga county? If so, perhaps a comparatively crowded county jail or crowded freeways or other conditions of congestion reflect invidious discrimination giving rise to a judicial remedy. These are all legislative problems. The most a court can do is see that the Legislature accurately reflects the population. This, this Court has done.

Appellants complain that "justice delayed is justice denied" (a statement as they quote it of Gladstone, significantly a politician not a judge), and that justice delayed is therefore a violation of the due process clause of the Fourteenth Amendment. But no property right is lost. Any damage award in a civil suit comes augmented by the legal interest rate (6%) from the date the damage occurred. Discovery in Ohio, includes the taking of depositions for the preservation of evidence. Furthermore, as the court below pointed out, if delay will actually prejudice a particular case, the Common Pleas Court rules provide for

an advancement on the docket (Common Pleas Court Rule 16). None of appellants alleged how his particular cause would be prejudiced.

None of the cases cited by appellants are like this one. All of the state cases were interpreting a specific state constitutional right to "trial without delay." In none of them, of course, was the Court asked to fashion a remedy like appellants request here.

Conclusion

The problem of delay is a task for bench and bar and legislatures: for the bench, per "bench," but not as a court fashioning a new remedy—enjoining the Legislature to give him more brothers of the bench. Appellants have a vexing grief but it is not a deprival of equal protection of the law nor of due process and in any event, they have chosen the wrong forum. They must go to the newly reapportioned Legislature.

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APPENDIX

Rules of the Court of Common Pleas of Cuyahoga County, Ohio

Rule 16. Advancing of Cases

(a) No case shall be advanced for pre-trial or trial out of its regular order except upon order of the Chief Justice upon motion or upon recommendation of one of the Judges for good cause shown, except that the Judge sitting in Room One and any pre-trial Judge may in his discretion advance a case before him for trial on the merits. No case shall be sent to a Civil trial room for assessment of damages on default, unless and until notice shall have been given to all counsel concerned either by publication in the Daily Legal News or otherwise as directed by the Court.

(b) On Monday of each week the Assignment Commissioner shall prepare and deliver to the Chief Justice a complete list of cases at issue which involves recovery upon forfeited bail bonds. Such cases shall be advanced for immediate trial.

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